

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2012] NZERA Auckland 429  
5388486

BETWEEN THE AUCKLAND GAS  
COMPANY LIMITED  
First Applicant

NOVA GAS LIMITED  
Second Applicant

A N D MICHAEL RICHARD MITCHELL  
First Respondent

NATIONAL ENERGY LIMITED  
Second Respondent

ALAN RICHARD MITCHELL  
Third Respondent

Member of Authority: Alastair Dumbleton

Representatives: Tony Stevens and Rob Cahn, counsel for Applicants  
Paul Wicks, counsel for Respondents

Investigation Meeting: 29 November 2012

Date of Determination: 30 November 2012

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] The investigation that has been commenced in the Authority by the two applicant companies is in relation to claims of breaches of confidence and breaches of a restraint of trade provision in an employment agreement, by the three respondents.

[2] There is no dispute that the first respondent Michael Mitchell worked for the business of the applicants Auckland Gas Company Ltd and Nova Gas Ltd under an employment agreement. When Mr Mitchell left he took with him a substantial amount of confidential commercially sensitive information, which he used in the

course of working for the second respondent National Energy Ltd, a company for which the third respondent Alan Mitchell also worked.

[3] The applicants seek from the Authority declaratory orders, permanent injunction orders restraining breaches of confidentiality and/or breaches of the restraint of trade, orders for a return of confidential information, orders for specific performance of contractual obligations, damages (including an account for profits), and penalties pursuant to ss.4A and 134 of the Employment Relations Act 2000.

[4] In relation to their liability, significant admissions have been made by the respondents or some of them, particularly Michael Mitchell. The issues and matters for investigation have been substantially narrowed as a result. Much of the investigation will be into the harm or loss suffered by the applicants and the extent of that for the purposes of quantifying the remedy of damages in particular.

[5] The parties are preparing to proceed at an investigation meeting early in 2013, but before then they have arranged to return to mediation on 17 December 2012.

### **Discovery**

[6] The parties have engaged in a discovery process using, by agreement, the mechanism provided for in the High Court for the discovery of documents. There are a number of reasons why this is regarded as appropriate, including that the case in the Authority is progressing in parallel with proceedings in the High Court where the same material discovered is likely to be relied upon as well.

[7] In the course of completing discovery the applicants have found it necessary to apply on notice for orders requiring the respondents to produce documents by way of further particular discovery.

[8] At an investigation meeting held to allow that application to be addressed by the parties, after further consideration was given by counsel, Mr Stevens and Mr Wicks, the respondents' opposition to the orders was substantially withdrawn after discussion about the nature of the documents for which discovery has been sought.

[9] On that basis the following orders are made:

1. That the respondents produce documents, by way of further particular discovery, within 7 days as follows:

- 1.1 Each of the respondents will file and serve supplementary lists of documents stating with respect to the categories of documents listed as AA, BB in the Agreed Categories Schedule presented by the applicants at the 29 November 2012 meeting and listed as E-M, Q, R, S, U, V, Z in Schedule 1 to this application;
  - (a) whether each respondent has or has had in their control those documents; and
  - (b) if they have been but are no longer in the particular respondent's control, specifying to that respondent's best knowledge and belief when each such document ceased to be in that party's control and who now has control of it; and
  - (c) identifying by number which documents in the 18 October 2012 affidavit of documents on behalf of the respondents they have, or have had, in their control and, in relation to any documents no longer in their control, addressing 1.1(b) above.
- 1.2 Each of the respondents will provide electronic copies of all non-privileged documents identified in a supplementary list (except for identifiable exact duplicates) immediately, or on provision of any required undertakings regarding any confidential documents in Part 3 of any supplementary lists.
- 1.3 Alternatively, issuing witness summons for such documents to be produced by the respondents at a meeting prior to the Investigation Meeting.

[10] Counsel have agreed that the categories of documents listed as W, X, and Y in Schedule 1 to the application can be dealt with by arrangement to be reached between them.

### **Injunction**

[11] Counsel Mr Wicks has advised that the respondents are not opposed to making injunctive orders as sought by the applicants. Accordingly, the Authority orders:

- 2.1 The first respondent shall not, directly or indirectly (through others):
  - (a) retain any Nova Downstream Confidential Information, as that term has been defined in the Amended Statement of Problem;
  - (b) use or deal with any Nova Downstream Confidential Information for his own purposes or benefit, or for the purposes or benefit of the second respondent (including its directors, officers, staff or other representatives) the third respondent, or any other person or entity;
  - (c) provide any Nova Downstream Confidential Information to any such person or entity; and/or

(d) otherwise breach or (directly or indirectly) cause to be breached the terms of the undertakings dated 14 August 2012 provided by the first, second and third respondents to the Authority.

2.2 As to the order sought at paragraph 2.1(a) above, the first respondent may either return any such documents to the applicants through their solicitors or provide them to his solicitors or counsel, to be held for the purposes of these proceedings only, for further production/discovery in escrow and in strict confidence.

2.3 Such order shall apply until further order of the Authority, except as necessary for this proceeding as authorised by the Authority or as agreed by the parties through their solicitors and/or counsel.

### **Costs**

[12] The applicants have sought an award of costs for preparation and for the meeting, which have been necessary for the applications to be made and determined for discovery and for an injunction restraining the first respondent from further breaches of confidence.

[13] For the respondents, Mr Wicks has submitted that costs should be reserved until the final disposal of all claims in due course, if that remains necessary.

[14] I consider it is appropriate to reserve costs, because the applications are unusual in the Authority, they have required significant preparation, and in the way they have been addressed, with a large measure of consensus reached between the parties, and in the achievement of their objective, the applications will have considerable bearing on the efficient and effectual disposal of all claims and on the resources of the parties required to do that.

[15] In my view, the application for costs should be considered as part of overall costs at the end point in this investigation.

[16] Leave is reserved for the parties to apply for any further orders or directions in this matter.

A Dumbleton  
**Member of the Employment Relations Authority**